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December 4, 1991

**VIA MESSENGER**

Mr. William W. Wilkins, Jr.  
Chairman  
United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, D.C. 20004

Re: 1992 Amendments

Dear Chairman Wilkins:

The ABA Sentencing Guidelines Committee has been following, with interest, the process by which the U.S. Sentencing Commission ("Commission") has been reviewing possible amendments to be promulgated by the Commission next year. We commend the Commission for the approach it has adopted, allowing various working groups to generate proposals for the Commission's consideration.

We believe the usefulness of this process will be enhanced if the Commission would publish, in the Federal Register for public comment, all of the various options it has been or will be considering for each proposed amendment. We note that the Commission did prepare several options for public comment in its consideration of the Sentencing Guidelines for Organizations, an expansive approach that generated substantial public comment.

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Additionally, we have discussed within our committee several issues of guideline application which may deserve the Commission's attention during the amendment process. While some of these matters may be addressed by the current working groups, we list below several areas of concern to our membership. As you will see, they range in significance, but each addresses a real problem.

First, the Sentencing Table and corresponding guidelines unnecessarily restrict the discretion of the Court to order probation with conditions of confinement and/or the new "split sentence. We believe that consistent with the Sentencing Reform Act's language regarding the sentencing of first offender's, the Commission should, at the very least, expand the eligibility for these alternative forms of punishment for those persons within criminal history category one. In other words, offenders beyond level 12 would be eligible, without a departure, for some form of sentencing. Similarly, we believe that the option of probation should be further expanded, again at least for first offenders. The Commission's annual report data appears to justify such amendments, given the extent to which the guidelines appear to require imprisonment in many more cases and for much greater periods of time than under prior practice.

Second, given the expansive nature of the relevant conduct standard set forth in Section 1B1.3, the number of relatively minor drug offenders receiving substantial periods of incarceration is significant. Without attempting to address the separate issue of Congressionally mandated mandatory minimum penalties, the Commission should create an exception from the drug quantity table for those offenders peripherally involved in distribution activity. While the definition of "peripheral role" need not conform to the prior Parole Commission definition, there should be a category of drug offenders, particularly the so-called "mule," that are excepted from the application of the quantity table.

Third, while the Commission has only a limited role in describing actions to be taken by members of the Executive branch and defense bar regarding pretrial discovery, there is a significant problem in guideline application that could be at least partially addressed by a Commission policy statement. The problem is that prosecutors will charge defendants in such a manner as to allow them to limit their disclosure obligations pursuant to Rule 16 and, after negotiating a plea a plea of guilty, submit additional evidence for use at sentencing. In other words, because the relevant conduct for sentencing is often so much more expansive than the discoverable evidence as to the indicted charges, the prosecutor may induce a plea without the defendant having any awareness of the actual evidence to be considered at sentencing and without having adequate knowledge, therefore, of his/her true guidelines exposure. A Commission policy statement encouraging

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pretrial disclosure of all information to be used in the calculation of the applicable guideline range, if not departures, would at least help create a more level playing field.

Thank you. I look forward to speaking with you about these and other amendments in the future.

Sincerely,

  
Steven M. Salkey  
Chairman, ABA Sentencing  
Guidelines Committee